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No. 94-680

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LAW FIRM OF LANPHERE & URBANIAK, GREGORY S. LANPHERE, and JOEL E. URBANIAK, individually and as partners thereof,
Petitioners,
vs.
STATE OF COLORADO, GALE A. NORTON, Attorney General for the State of Colorado, in her official capacity only, ROY ROMER, Governor of the State of Colorado, in his official capacity only,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether a reasonable restriction regarding immediate, direct access to government-held criminal justice records, based upon the intent to use such records for commercial speech, violates the First Amendment.

B. Whether one type of equal protection claim alleged in an amended complaint, and later neglected, may serve as the basis for another type of equal protection claim raised for the first time in a petition for writ of *certiorari* to the United States Supreme Court.

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STATEMENT OF THE CASE

The petitioners are licensed attorneys in the State of Colorado. Their practice involves defending persons who have been accused of traffic violations. The petitioners have used the criminal records of the State of Colorado ("State") to solicit clients for pecuniary gain.

In 1992, the State of Colorado amended its Criminal Records Act by adding § 24-72-305.5, which provides:

> **Access to records – denial by custodian – use of records to obtain information for solicitation.** Records of official actions and

> criminal justice records and the names, addresses, telephone numbers, and other information in such records shall not be used by any person *for the purpose of soliciting business for pecuniary gain*. The official custodian shall deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records *shall not be used for the direct solicitation of business for pecuniary gain*. [Emphasis added.]

Under § 24-72-305.5, the petitioners' access to the records was denied because the petitioners refused to sign the statement described in the statute.

The petitioners brought suit in federal court for the District of Colorado. Based on stipulated facts, the district court entered judgment for the State. The district court found that the State cannot be compelled to divulge information for all purposes, including lawyer advertising. It was also found that, even if a constitutional right to access existed, § 24-72-305.5 is nevertheless sustainable because its provisions reasonably fit its objectives.

A majority panel of the Tenth Circuit Court of Appeals affirmed. The Tenth Circuit held that the First Amendment was implicated, because the Colorado legislature drew a regulatory line based on the commercial-speech use of the records. Applying *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 357 (1980), the Tenth Circuit concluded § 24-72-305.5 is constitutional because it protects the right to privacy, and maintains public confidence in the judicial system, without unduly burdening the petitioners' speech.

The petitioners seek a writ of *certiorari* for the purpose of obtaining review of § 24-72-305.5 under the First Amendment

and the equal protection clause. A denial of equal protection was not alleged by the petitioners during their appeal in the Tenth Circuit, nor did the Tenth Circuit decide that issue on its own.[1] The issue was mentioned in the amended complaint, although the petitioners never supported it thereafter.

SUMMARY OF THE ARGUMENT

Neither *Innovative Database System v. Morales*, 990 F.2d 217 (5th Cir. 1993) nor *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994) involve a critique of a statute like § 24-72-305.5. Section 24-72-305.5 does not raise any new or important constitutional issues.

The petitioners waived their right to raise an equal protection claim here because, although a claim was alleged in the amended complaint, it was not supported by any subsequent argument, and it was not the same type of claim raised in the instant petition.

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[1]The petition omits the fact that the district court below expressly refused to evaluate the petitioners' solicitation letters for any ethical improprieties. Some of the petitioners' letters were sent to individuals who already retained counsel. As a result, some of the recipients were confused by the letters.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DOES NOT RAISE ANY NEW OR IMPORTANT CONSTITUTIONAL ISSUES.

Section 24-72-305.5 possesses unique characteristics, and it creates unique results. It creates two classes: (1) a class of persons that want access to government-held criminal records for purposes other than soliciting business for pecuniary gain; and (2) a class of persons that want access for the purpose of soliciting business for pecuniary gain. The former class members are granted access, after signing the statement the statute describes.

Section 24-72-305.5 does not, however, prohibit the members of the class that have access from passing the information the records contain on to the members of the class that do not have access. In other words, the statute does not interfere with communications made between the classes.

Section 24-72-305.5 does not prohibit speech, *per se*. It denies direct access to judicial records for commercial solicitation purposes. It does not deny indirect access for commercial purposes. For example, the statute tolerates those (such as the petitioners) who obtain the information from non-governmental sources (such as the local newspapers). Such indirect access may serve as the basis for commercial speech.

The indirect-access feature of the statute is important to the understanding of the restriction § 24-72-305.5 places on commercial speech. The restriction is represented by the delay in the communication of the information the records contain between the two classes the statute creates. Here, that restriction

is nominal, at best. A local newspaper immediately obtains and publishes the information.

The State possesses three policy interests that justify § 24-72-305.5. First, § 24-72-305.5 protects the privacy interests of those merely accused of criminal conduct.[2] Second, § 24-72-305.5 advances the State's interest in lessening the danger of overreaching by solicitors. It also advances the related interest of maintaining public confidence in our system of justice. Third, § 24-72-305.5 tends to restrict the use of the records to the uses originally intended -- the administration of justice and law enforcement.

Section 24-72-305.5 directly and immediately advances each of Colorado's policy interests. The State's interest in protecting the privacy interests of those merely accused of criminal conduct is an interest of the highest order. Immediately after being accused of a crime, an individual, although legally innocent, is vulnerable. The individual requires a brief period to control his emotions and make a reasoned decision about whether or not he should defend himself. That opportunity is disrupted when the individual knows others have access to the fact that he has been accused and will immediately descend upon him for his business. Section 24-72-305.5 protects an individual's ability to evaluate his legal interests in private. And it fosters respect for the judicial system by refusing direct State assistance to those who seek to profit from an individual's misfortune.

Simultaneously, § 24-72-305.5 tends to limit the use of the records to their original purposes. Colorado's criminal records system was created for the purpose of law enforcement and the

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[2]Some of the accused that received the petitioners' solicitations were subsequently acquitted. For them, the invasion of their privacy by the petitioners was most profound.

administration of justice. It was never thought that the records in question would serve as a private-sector client base. It has never been disputed that the original purposes of the records system are important and legitimate, or that the State could not limit the records to those purposes.

Contrary to the petitioners' assertions, the Tenth Circuit's analysis falls squarely within the analysis of *Shapero v. Kentucky Bus Ass'n*, 486 U.S. 466 (1988). As the Tenth Circuit noted, the Supreme Court has held that the invasion of privacy occurs when the lawyers discover the individual's legal affairs. The Tenth Circuit properly concluded that this case involves the invasion of privacy as defined in *Shapero*. Therefore, this case does not address new or important constitutional issues.

II. *INNOVATIVE DATABASE SYSTEMS V. MORALES*, 990 F.2D 217 (5TH CIR. 1993) AND *SPEER V. MILLER*, 15 F.3D 1007 (11TH CIR. 1994) DO NOT CONFLICT WITH THE OPINION OF THE TENTH CIRCUIT.

Innovative Database Systems v. Morales, 990 F.2d 217 (5th Cir. 1993) is distinguishable from the instant case. In *Innovative*, the court evaluated a Texas statute prohibiting persons in possession of law enforcement information from using the information to contact a crime victim or a person involved in a motor vehicle accident or a member of the person's family for the purpose of soliciting business from the person or the family member. The statute also prohibited such persons from selling the information to another person for financial gain.

Unlike § 24-72-305.5, the Texas statute was not an access-to-judicial-records statute. It was a direct-burden-on-speech statute. Statutes involving direct burdens on speech are held to

an unqualified First Amendment standard. By contrast, access-to-judicial-records statutes, like § 24-72-305.5, are held to a two-pronged, First Amendment standard. *For example*, *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

The *Innovative* court was not asked to evaluate all the same interests asserted here under the same circumstances presented here. Texas attempted to justify a total ban on the use of lawfully obtained, public information to contact certain people in the name of promoting ethical standards, preventing fraud and misrepresentation by professionals, and protecting the public from unnecessary, inflated insurance rates. This case involves, not only overreaching by professionals, but, also, privacy rights and restricting the records to their original uses.

The *Innovative* statute involved a direct, total ban on any type of speech. Under those circumstances, it was appropriate for the court to evaluate the statute under *Shapero v. Kentucky Bar Ass'n.*, 485 U.S. 466 (1988). By contrast, § 24-72-305.5's access-to-records restriction only indirectly burdens speech, and is properly evaluated under the analysis contained in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) and *Central Hudson*, *supra*. *Shapero* is only tangentially related to the analysis.

Speer v. Miller, 15 F.3d 1007 (11th Cir. 1994) involved the enforcement of a Georgia statute prohibiting access to law enforcement records for the purpose of obtaining the names and addresses of victims of crimes or persons charged with crimes or persons involved in motor vehicle accidents or other information contained in such records for commercial solicitation of the individuals or the relatives of such individuals.

The *Speer* court was asked to conduct an interlocutory review of a denial of a motion for preliminary injunction. The

court reversed and remanded, finding that the statute probably impinged upon the movant's commercial speech.

That *Speer* involved an interlocutory appeal of an order denying a preliminary injunction is an important, distinctive characteristic. Unlike the instant case, no state interests were asserted in *Speer* in defense of the Georgia statute. The *Speer* court expressly held that Georgia had no opportunity to develop its interest in the area, and remanded the case for reconsideration after a plenary hearing. It is, therefore, premature to conclude *Speer* conflicts with the Tenth Circuit's decision.

In addition, the *Speer* court ignored the case law analyzed in detail in the Tenth Circuit opinion below. As such, the *Speer* decision, like the *Innovative* decision, does not contain any analysis of the access-to-records authorities on the subject. Nor does it apply *Central Hudson, supra*. Devoid of analysis as rigorous as the Tenth Circuit's analysis, *Speer* is not persuasive.

III. THIS COURT SHOULD NOT HEAR AN ISSUE THAT WAS NOT ARGUED TO THE COURTS BELOW. THEREFORE, THE PETITIONERS' EQUAL PROTECTION CHALLENGE SHOULD NOT BE HEARD BY THIS COURT.

The petitioners further challenge § 24-72-305.5 on equal protection grounds. They claim the equal protection problem exists by virtue of the fact that the statute permits access for noncommercial solicitations and prohibits access for commercial solicitations. However, to properly raise the issue before this Court, the petitioners should have argued it to the district court, and raised it again for the Tenth Circuit. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U.S. 545 (1938).

The petitioners alleged a denial of equal protection in their amended complaint. However, the allegation was different from the one contained in the instant petition. In the amended complaint, the petitioners alleged that it was unconstitutional for the State to grant access to civil records but not criminal records. The petitioners did not pursue the claim before the district court, nor did they raise it for the Tenth Circuit. The claim has been waived. The claim contained in the petition has never been raised before. Therefore, both equal protection claims are barred.

CONCLUSION

The State respectfully requests an order denying the Petition for Writ of *Certiorari*.

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